

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324a Proceeding
) Case No. 94A00171
CENTRAL NEBRASKA)
PACKING, INC.,)
Respondent.)
_____)

FIRST PREHEARING CONFERENCE REPORT AND ORDER
(December 5, 1994)

The first telephonic prehearing conference was held as previously scheduled on December 5, 1994 at 10:00 a.m.

The parties stated that they had been unable to reach a settlement of the case and were ready to begin discovery requests. Both parties should make an effort to answer discovery requests in an expeditious manner.

Complainant's Motion to Strike Affirmative Defenses was granted with the exception of Respondent's first affirmative defense of good faith which was granted in part and denied in part.¹ As stated in U.S. v. Hosung Cleaning Corp., 4 OCAHO 670 at 2 (1994),

¹ Both Respondent's first and second affirmative defenses alleged good faith as a defense although reasonable reliance on the documentation presented by the individuals named in the complaint was also part of Respondent's second affirmative defense. This ruling applies to both Respondent's first and second affirmative defenses in that they are essentially the same defense.

a good faith effort at compliance, such as reliance on the employee's documentation, or cooperation with INS [Immigration and Naturalization Service], is one of five statutory criteria to be considered in determining an appropriate civil money penalty. A good faith compliance effort is immaterial to the question of liability for failure to prepare, present or complete the Forms I-9. (emphasis added) (citations omitted).

However, to the extent Respondent pleads good faith as an affirmative defense in Count I of the Complaint for "knowingly hiring" unauthorized aliens, the defense stands. It is also a factor to be taken into consideration when determining the quantum of penalty in the event Respondent is found in violation of § 1324a.

The affirmative defense of cooperation/lack of education is also stricken on the grounds that "[a]n employer is not entitled to an educational briefing as a condition precedent to enforcement of its obligations under the employer sanctions program of 8 U.S.C. § 1324a." Id. at 3 (citations omitted).

Finally, Respondent's affirmative defense alleging laches is stricken. There is no statutory requirement that § 1324a complaints be served on complainants within a specified amount of time. Respondent may, however, offer evidence of undue hardship which INS' delay in filing this complaint caused in order to attempt to mitigate the penalty imposed should Respondent be found in violation of § 1324a.

As agreed to by the parties, a second telephonic prehearing conference has been set for February 28, 1995 at 10:00 a.m. In the event the parties are unable to agree to a settlement of this case, a hearing date will be set during the second prehearing conference. In addition, a deadline for discovery will be set at the conference.

For Complainant Paul R. Stultz

For Respondent Jerry L. Pigsley
 Harding & Ogborn

SO ORDERED. Dated and entered this 5th day of December, 1994.

MARVIN H. MORSE
Administrative Law Judge